

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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No. 10-1983

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**UNITED STATES OF AMERICA,**

Appellee,

v.

**NEIL KRAMER,**

Appellant.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI, SOUTHERN DIVISION  
HONORABLE RICHARD DORR, DISTRICT JUDGE

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**BRIEF FOR THE UNITED STATES**

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## **SUMMARY OF THE CASE**

The appellant, Neil Kramer, pleaded guilty to one count of knowingly transporting a minor in interstate commerce with the intent to engage in prohibited sexual conduct, in violation of 18 U.S.C. § 2423(a). On appeal, Kramer challenges the district court's determination that he utilized a computer "to persuade, induce, entice, coerce, or facilitate the travel of the minor to engage in prohibited sexual conduct," pursuant to U.S.S.G. § 2G1.3(b)(3).

However, as the district court properly concluded, the cellular telephone utilized by Kramer to facilitate his illicit contact with his victim constituted a "computer" under the relevant statutory provisions. Therefore, Kramer's claim must be rejected.

Although Kramer has requested 15 minutes for oral argument, the Government believes that this case may be disposed of on the briefs without argument.

## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
SUMMARY OF THE CASE .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE ISSUE .....	1
STATEMENT OF THE CASE .....	3
STATEMENT OF THE FACTS .....	4
SUMMARY OF THE ARGUMENT .....	6
ARGUMENT	
The district court correctly determined the cellular telephone utilized by Kramer to commit the offense of conviction was a “computer” under the provisions of U.S.S.G. § 2G1.3(b)(3) and 18 U.S.C. § 1030(e)(1) .....	7
CONCLUSION .....	14
CERTIFICATE OF COMPLIANCE .....	15
CERTIFICATE OF SERVICE .....	16

## **TABLE OF AUTHORITIES**

### **Cases**

### **Page**

<i>Czech v. Wall Street on Demand, Inc.</i> , 674 F. Supp. 2d 1102(D. Minn., 2009) .....	2, 12
<i>United States v. Bates</i> , 584 F.3d 1105 (8th Cir. 2009) .....	7
<i>United States v. Black</i> , No. 04-CR-162-S, 2004 WL 3091175 (W.D. Wis. Jan 7, 2004) .....	12
<i>United States v. Hill</i> , 583 F.3 (8th Cir. 2009) .....	7
<i>United States v. Lay</i> , 583 F.3d 436 (6th Cir. 2009) .....	11
<i>United States v. Meador</i> , No. 1:06 CR 134 CDP DDN, 2008 WL 4922001 (E.D. Mo. Jan. 7, 2008) .....	12
<i>United States v. Park</i> , Number CR 05-375 SL, 2007 WL 1521573 (N.D. Cal. May 23, 2007) .....	2, 12

### **Statutes**

18 U.S.C. §1030(e)(1) .....	ii, 1, 6, 7, 8, 11, 12, 13
18 U.S.C. § 2423(a) .....	i, 3
Fed. R. App. P. 32(a)(7)(B) .....	15
Fed. R. App. P. 32(a)(7)(C) .....	15

### **Sentencing Guidelines**

U.S.S.G. § 2G1.3(b)(3) .....	i, ii, 1, 6, 7, 8, 11, 13
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**STATEMENT OF THE ISSUE**

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Whether the district court correctly determined that Kramer was subject to a two-level increase to his base offense level pursuant to U.S.S.G. § 2G1.3(b)(3) based upon evidence establishing that the cellular telephone he utilized during the course of the offense of conviction constituted a “computer” as defined under 18 U.S.C. § 1030(e)(1) .

### Cases

*United States v. Park*, No. CR 05-375 SL, 2007 WL 1521573 (N.D. Cal. May 23, 2007)

*Czech v. Wall Street on Demand, Inc.*, 674 F.Supp.2d 1102 (D. Minn., 2009)

## **STATEMENT OF THE CASE**

On April 2, 2009, an indictment was filed in the United States District Court for the Western District of Missouri, charging the appellant, Neil Kramer, with transportation of a minor with intent to engage in criminal sexual activity, in violation of 18 U.S.C. § 2423(a). (D.E. 2.)<sup>1</sup>

On December 21, 2009, Kramer pleaded guilty to the indictment without benefit of a written plea agreement. (D.E. 31.) On April 22, 2010, a sentencing hearing was conducted before the district court. (D.E. 40.) During the course of the sentencing hearing the district court concluded that Kramer's cellular telephone, utilized to facilitate contact between himself and the 15-year-old victim, constituted a "computer" as defined by law.

As result of this finding, Kramer's base offense was increased by two levels. Kramer noted his objection to the application of this provision. Kramer was then sentenced by Judge Richard Dorr to 168 months' imprisonment, followed by a 15-year term of supervised release.

Kramer filed a timely notice of appeal from this judgment.

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<sup>1</sup>"D.E." refers to the numbered docket entry in this case.

## **STATEMENT OF THE FACTS**

In April, 2008, a 15 year-old female residing in the Western District of Missouri inadvertently sent a text message to Neil Kramer, a career criminal and parolee, who was then a resident of Louisiana. (PSR ¶¶ 6, 39.) Kramer sent a reply to the message, beginning a seven-month period in which he and the victim regularly corresponded with one another through text messaging and telephonic communication. (PSR ¶ 6.) The victim, during these communications, revealed to Kramer that she was 15 years of age. (PSR ¶ 6.)

On November 10, 2008, the victim contacted Kramer and the two arranged to meet in Cabool, Missouri, that night. (PSR ¶¶ 6-7.) At approximately, 12:30 a.m. on November 11, 2008, Kramer made contact with the victim at the Bull's Eye Convenience Store, after driving from his home in Violet, Louisiana. (PSR ¶ 7.) The pair drove to the Comfort Inn in Willow Springs, Missouri, where he plied the victim with illegal narcotics and then engaged in sexual intercourse with her. (PSR ¶ 7.)

At 8 a.m., Kramer and the victim departed Willow Springs, Missouri, and drove to Kramer's trailer in Violet, Louisiana. (PSR ¶ 7.) Upon their arrival, Kramer gave the victim more narcotics and again had sexual intercourse with her. (PSR ¶ 7.)



On Friday, November 14, 2008, Kramer took the victim to Barracuda's Bar in Poydras, Louisiana. (PSR ¶ 6.) The victim, after ingesting several alcoholic beverages, excused herself to use the restroom, where she was able to send a text message to her mother reporting her location. (PSR ¶ 9.) The victim's mother immediately contacted the authorities. (PSR ¶ 9.) Members of the St. Bernard Parish Sheriff's Department responded to the bar and arrested Kramer in the parking lot. (PSR ¶ 9.) The victim was located in the bathroom and was thereafter reunited with her family. (PSR ¶ 9.)

## **SUMMARY OF THE ARGUMENT**

On this appeal, Kramer asserts that the district court erred in concluding that Kramer's cellular telephone was a "computer" under U.S.S.G. § 2G1.3(b)(3), as defined by 18 U.S.C. § 1030(e)(1). Specifically, Kramer alleges that the evidence presented by the Government during the sentencing hearing was inadequate to establish that the telephone constituted a computer, and that the provisions of U.S.S.G. § 2G1.3(b)(3) do not apply to the use of a cellular telephone.

However, the district court correctly concluded that Kramer's cellular telephone, a device that is in every important respect indistinguishable from a traditional computer, was a "computer" under the broad definition of that word as it appears in 18 U.S.C. § 1030(e)(1). The district court's determination should therefore be affirmed by this Court.

## **ARGUMENT**

**The district court correctly determined that the cellular telephone utilized by Kramer to facilitate his illicit contact with his 15-year-old victim was a “computer” as defined by 18 U.S.C. § 1030(e)(1).**

Kramer argues that the district court erred in concluding that the cellular telephone utilized to facilitate his crime constituted a “computer” under the provisions of U.S.S.G. § 2G1.3(b)(3). The district court, however, properly found that the provision in question was applicable based upon the evidence adduced at the sentencing hearing.

### ***A.     Standard of Review***

With regard to issues involving the interpretation and application of the Sentencing Guidelines, the district court’s findings of fact are reviewed for “clear error,” while legal conclusions are reviewed *de novo*. *United States v. Hill*, 583 F.3d 1075, 1077 (8th Cir. 2009); *United States v. Bates*, 584 F.3d 1105, 1108 (8th Cir. 2009).

### ***B.     Discussion***

On appeal, Kramer advances two arguments in support of his contention that the district court erred in assessing a two-level increase in his base offense level pursuant to U.S.S.G. § 2G1.3(b)(3). First, Kramer argues that the Government did not submit sufficient evidence to support the district court’s

conclusions. Alternatively, Kramer avers that a cellular telephone is not, in any case, a “computer” as defined by 18 U.S.C. § 1030(e)(1). Each of these arguments, however, has no merit.

U.S.S.G. § 2G1.3(b)(3) mandates a two-level increase to an offender’s base offense level “[i]f the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct . . .” The term computer “has the meaning given that term in 18 U.S.C. § 1030(e)(1).” U.S.S.G. § 2G1.3, Application Note 1. 18 U.S.C. § 1030(e)(1) defines a computer as “an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or similar device.”

*1. The Evidence Adduced at the Sentencing Hearing was Sufficient to Support the Application of U.S.S.G. § 2G1.3(b)(3).*

Kramer first alleges that the Government did not adduce sufficient evidence to support the application of U.S.S.G. § 2G1.3(b)(3). Specifically, Kramer asserts that the Government was required to prove that his cellular

telephone was a “high speed data processing device” and that it failed to do so. The Government maintains that the disjunctive phrasing contained in the statutory definition of the term computer means that a computer can be: (1) electronic; (2) magnetic; (3) optical; (4) electrochemical; or (5) other high-speed data processing devices that are capable of performing logical, arithmetic, or storage functions. If the Government’s interpretation is correct, then Kramer’s argument unequivocally fails as the cellular telephone in question is unquestionably an electronic device capable of performing logical, arithmetic, and storage functions. (*See, e.g.*, Jt. Appx. 118-19.)

Assuming *arguendo*, however, that Kramer is correct in his interpretation of the statute, that is, the Government must prove that the cellular telephone is a high-speed data processing device, his assertion that the Government failed to provide sufficient proof of this fact is incorrect. The Government introduced at the sentencing hearing the operating manual and informational materials pertaining to Kramer’s cellular telephone. (Jt. Appx. 1-120.)

The features of the particular cellular telephone utilized by Kramer to commit his crime include the ability to make and receive wireless telephone calls, send and receive text messages, the ability to store and retrieve information, instant messaging capabilities, send and receive e-mails, network with other devices utilizing Bluetooth technology, access the Internet, play

games, music, and video, as well as taking and transmitting photographs. (Jt. Appx. 74-95.)

In short, Kramer's cellular telephone performs substantially the same tasks as a modern computer. Moreover, even the device's most basic feature, that is, a telephone, is a "high speed data processing device." A telephone is defined as "an instrument for reproducing sound at a distance; specifically: one in which sound is converted into electrical impulses for transmission (as by wire or radio waves)." "Telephone." Merriam-Webster Online Dictionary. 2010. <http://www.merriam-webster.com/dictionary/telephone> (20 July, 2010.)

Kramer's cellular telephone, using its most elementary function, converted sound to electrical impulses and then from electrical impulses almost instantaneously. The more sophisticated functions such as video and audio playback, the capturing and transmission of digital photographs also clearly constitute "high speed data processing." There is nothing so technical about these functions that expert testimony was required to explain them to the district court. The evidence adduced at the hearing conclusively established Kramer's cellular telephone "perform[ed] logical, arithmetic, or storage functions" such as acting as a calculator, storing music, digital photographs, and video, the device therefore unquestionably fell under the definition of computer as defined by 18 U.S.C. § 1030(e)(1). The district court correctly

concluded that the weight of the evidence supported the imposition of the two-level enhancement prescribed by U.S.S.G. § 2G1.3(b)(3).

2. An “Ordinary Cellular Telephone” of the Type Utilized by Kramer to Facilitate His Crime Is a “Computer” as Defined by 18 U.S.C. § 1030(e)(1).

Kramer, alternatively, avers that an “ordinary cellular telephone” cannot, apparently in any case, ever constitute a “computer.” In support of this contention, Kramer cites to a single case, *United States v. Lay*, 583 F.3d 436 (6th Cir. 2009), in which neither the district court nor the appellate court was even asked to entertain the possibility that a cellular telephone utilized by the defendant could be considered a “computer” under U.S.S.G. § 2G1.3(b)(3). Considering that modern cellular telephones, such as the one used by Kramer, have the very same capabilities as a traditional computer, Kramer’s argument that cellular telephones cannot, under any circumstances, fall under the definition of “computer” under 18 U.S.C. § 1030(e)(1) is without merit.

While there does not appear to be a case that squarely addresses the issue now before this Court, it is well-known that “[t]oday’s cellular telephones are not just instruments for placing and receiving phone calls.” *United States v. Meador*, No. 1:06 CR 134 CDP DDN, 2008 WL 4922001, at \*11 (E.D. Mo. Jan. 7, 2008) (citing *United States v. Black*, No. 04-CR-162-S, 2004 WL 3091175, at \*7 (W.D. Wis. Jan 7, 2004)). As a consequence, “the line between

cell phones and personal computers has grown increasingly blurry.” *United States v. Park*, No. CR 05-375 SL, 2007 WL 1521573, at \*8 (N.D. Cal. May 23, 2007).

In the only case that directly addressed whether a cellular telephone constitutes a computer, the United States District Court for the District of Minnesota concluded “[t]here is no dispute that Czech’s cell phone (as well as the various similar wireless devices used by the proposed class members) would constitute such a “computer” as further defined in 18 U.S.C. § 1030(e)(1)).” *Czech v. Wall Street on Demand, Inc.*, 674 F.Supp.2d 1102, 1107 at n.5 (D. Minn., 2009.)

The definition of computer contained in 18 U.S.C. § 1030(e)(1) has been in place since before 1990, when computers were far less sophisticated and had only very basic capabilities. Kramer cites the claim that he did not access the Internet through his telephone as a reason why his telephone is not a “computer.” Kramer, however, ignores the fact that the Internet, in its present form, did not exist at the time the definition in question was drafted. The definition in 18 U.S.C. § 1030(e)(1) was drafted to include what we would now consider primitive computer designs. The cellular telephone utilized by Kramer is far more advanced than all but the most sophisticated computers of the last century.



Consequently, this definition now encompasses a broad swath of electronic devices that have developed over the ensuing years. As such, Kramer's cellular telephone is clearly a "computer" within the meaning of U.S.S.G. § 2G1.3(b)(3). Therefore, the holding of the district court must be affirmed.

## **CONCLUSION**

For all of the reasons set forth above, the district court's ruling should be upheld, and Kramer's sentence should be affirmed.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that this brief complies with the type-volume limitations in Fed. R. App. P. 32(a)(7)(B) and contains 2556 words. The brief was prepared using WordPerfect for Windows Version X3 software. In making this certification I have relied upon the word-count feature of WordPerfect for Windows, Version X3. Furthermore, the enclosed diskette has been scanned and been determined to be virus-free in compliance with Eighth Circuit Rule 28A(c).

/s/ James J. Kelleher

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Assistant United States Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that two copies of the Government's brief and a virus-free disk were mailed this 22nd day of July 2010, to:

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